89-658

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN L. CHEEK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

In this criminal tax case, willfulness is an element of the crime; conversely, good faith is a defense. Petitioner convincingly centered his defense on the sincere good faith of his belief that he was not breaking the law.

Alone among the Circuits, in the Seventh Circuit sincere good faith is not enough. Unlike any other Circuit, the Seventh Circuit polices beliefs, so that petitioner's beliefs must also be "objectively reasonable"—and some of them are deemed "objectively unreasonable as a matter of law." The result is that petitioner—despite the sincere good faith on which he based his defense—can be sent to jail for holding unapproved beliefs. The jury was so instructed. Petitioner was convicted.

The questions presented are:

1. Is the Seventh Circuit's unique "objectively reasonable" test in criminal tax cases, under which petitioner was convicted and sentenced to jail because the Court announced (a) that his sincerely-held beliefs had to be "objectively reasonable," and (b) that some of his beliefs were "unreasonable" and therefore impermissible, consistent with the statutes under which Petitioner was convicted?

2. If so, is the Seventh Circuit's approach consistent with the First, Fifth, and Sixth Amendments?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner John L. Cheek respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, entered on August 21, 1989. (The mandate was stayed by the Court of Appeals on October 10, 1989; *see Appendix F.*)

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported. It is *Appendix A* to this Petition.

JURISDICTIONAL STATEMENT

The August 21, 1989 judgment of the United States Court of Appeals for the Seventh Circuit (*Appendix A*) affirmed petitioner Cheek's March 16, 1988 criminal conviction (*Appendix B*). This Court's jurisdiction rests upon 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech. . . .

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed . . . .

26 U.S.C. Sec. 7201 provides in pertinent part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this Title or the payment thereof shall in addition to other penalties

> provided by law, be guilty of a felony and upon conviction thereof shall be fined not more than $100,000 . . . or imprisoned not more than 5 years or both, together with the costs of prosecution.

26 U.S.C. Sec. 7203 provides in pertinent part:

> Any person . . . required this Title or by regulations made under authority thereof to make a return, . . . who willfully fails . . . to make such return, . . . at the time or times required by law or regulations shall in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $25,000 . . . or imprisoned not more than 1 year or both, together with the costs of prosecution.

18 U.S.C. Sec. 287 provides:

> Whoever makes or presents to any person or officer or to department or agency thereof, any claim upon the United States or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than 5 years and shall be subject to a fine in the amount provided in this Title.

STATEMENT OF THE CASE

The basis for Federal jurisdiction in the court of first instance, *i.e.*, the District Court, is Title 18, U.S.C., Sec. 3231, which states:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

On March 9, 1987 petitioner John L. Cheek, a pilot for American Airlines since 1973, was indicted on three counts of willful income tax evasion for the tax years 1980, 1981, and 1983 (in violation of 26 U.S.C. Sec. 7201), one count of wilfully submitting a false claim against the government for income tax withheld in 1982 (in violation of 18 U.S.C. Sec. 287), and three counts of willful failure to file income tax returns for the tax years 1980, 1981, and 1983. Later that year, on September 14, 1987, a superseding indictment was issued adding three counts of willful failure to file for the years 1984, 1985, and 1986. (*Appendix A.*)

At his jury trial, petitioner proceeded *pro se*. He presented, by way of defense, evidence of his sincerely-held view that he did not believe he had violated the law in failing to comply with the tax laws as charged (*i.e.*, that his conduct was not "willful").

Before closing arguments in the trial, the District Court conferred with the parties regarding instructions to the jury. The Court agreed to give the willfulness instruction from *United States v. Pomponio*, 429 U.S. 10 (1976), *rehearing denied*, 429 U.S. 987 (1976), which read:

> When used in these instructions the term "willfully" means a voluntary, intentional violation of a known legal duty, as distinguished from a violation which is accidental, inadvertent or negligent. In establishing that the defendant acted willfully it is not required that the government show that the defendant had a bad purpose.

(*Appendix C* at 20.) Two other instructions on willfulness were discussed. The first was a definition of "objectively reasonable good faith misunderstanding" which was originally tendered as Government Instruction 38 (*Tr.* 1565-1566) and, after redrafting by the Court, was given, over

petitioner's objections, as Jury Instruction No. 32. It was read as follows:

> An objectively reasonable good faith misunderstanding of the law negates willfulness. An objectively reasonable good faith misreading of the law may be based upon the defendant's own legal research or an attorney's advice. Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct. It requires that the defendant honestly and reasonably believe his research or the advice, and believe that it is correct and relies upon it.
>
> Disagreement with the law does not constitute a good faith misunderstanding of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

(*Jury Instruction* No. 32; *Tr.* 1684; *Appendix C* at 20.) Government counsel asserted that this instruction was accurate. (*Tr.* 1565-1566.) The second instruction at issue was a theory of defense instruction prepared by the Court (*Tr.* 1553-1554, 1559-1562) and given as Jury Instruction No. 53. (*Tr.* 1690-1691; *Appendix C* at 21.) Instruction 53 discussed, among other things, petitioner's belief that he was not a taxpayer, that his wages did not constitute income, and that he was not required to file tax returns.

Instructions 32 and 53 both told the jury that they were to determine if petitioner's beliefs in regard to his tax obligations were both honest and "objectively reasonable." The District Court told petitioner that these instructions allowed him to argue to the jury that his beliefs were honest and reasonable, regardless of whether his beliefs were correct under the law. (*Tr.* 1560-1562, 1568-1569, 1579.) The Government agreed. (*Tr.* 1565-1566, 1568.) This

was the law of the case which was argued by the parties and which was submitted to the jury. The jury was troubled. At approximately 4:30 p.m. on the first full day of deliberations, a note was received from the jury which stated, *inter alia*:

> We have a basic disagreement between some of us as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income taxes.
>
> We have struggled with this point for part of the morning & the entire afternoon with no movement.
>
> Page 32 discusses good faith misunderstanding & disagreement. Is there any additional clarification you can give us on this point?
>
> Page 53 is the one we cannot get by as to his belief.

(*Appendix D* at 23.) Over petitioner's objection,[1] in answer to this note, the Court gave the jury what was, in essence, previously-rejected Government Instruction No. 38, which stated:

> You have asked for a clarification of page 32 of the instructions discussing good faith misunderstanding and disagreement. As I instructed you, an objectively reasonable good faith misunderstanding of the law negates willfulness. However, a person's opinion that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the law. Furthermore, a person's disagreement with the government's tax collection systems and policies does not constitute a good faith misunderstanding of the law. This additional instruction should be read and considered with all the other instructions in considering your verdict.
>
> The government has the burden of proving willfulness beyond a reasonable doubt.

(*Reinstruction* No. 1; *Tr.* 1723-1724; *R.* 135; *Appendix D* at 24.)

[1] Petitioner, in objecting to the supplemental instruction proposed by the Government, told the Court: "They are trying to get a directed verdict of guilty, which is not the system of justice." (*Tr.* 1709.)

Several hours later at 7:10 p.m. the jury was deadlocked, sending out another note, which stated:

> We, the jury, are unable to reach a decision. We are all in agreement that Mr. Cheek did not file tax returns in the years charged. We are all in agreement that Mr. Cheek filed incorrect W-4 forms. We are divided on the issue as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income tax. We feel that no amount of deliberation will reach a unanimous decision.

The note was signed by all the jurors. (*Jury Note* No. 2; *Tr.* 1726; *Appendix D* at 24.) This note contained no request for clarification and no question relating to the instructions.

At the Government's request, the District Court gave a further supplemental instruction, which stated, *inter alia:*

* * *

> An objectively reasonable belief means a belief held by a reasonable person acting reasonably. *An honest but unreasonable belief is not a defense and does not negate willfulness.*
>
> * * *
>
> *Advice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable* and cannot serve as the basis for a good faith misunderstanding of the law defense.

(*Tr.* 1757-1759; entire instruction is *Appendix D* at 25; emphasis added.) Petitioner objected to this second supplemental instruction (*Tr.* 1750, 1756), stating: "It just seems to me like the Court is just writing everything so that I don't have any defense at all."

Approximately 2½ hours after being given this second supplemental instruction, the jury returned with guilty verdicts on all counts. The jury also sent three notes to the Court. The first note was signed by all the jurors; the other two were written by individual jurors. The first note said:

> Judge Plunkett:
>
> We are herein returning our verdict of guilty as charged on all counts.
>
> Some of our jurors wished to express their personal opinions. These opinions are not meant to affect in any way their verdict of guilty. These opinions are forwarded as a complaint against the narrow & hard expression under the constraints of the law.

(*Appendix E* at 27.)

The second note, from an individual juror, stated:

> Judge Plunkett:
>
> I feel Mr. Cheek is a reasonable person and sincerely believes in his cause. I felt I had to write to express what I sincerely feel. I know the gentleman is guilty of a crime. However, I honestly believe he believes so deeply in his cause that he has risked everything for this cause and truly does not believe he is breaking the law.

The third note, written by juror Diener, prompted a brief colloquy with the court:

> THE COURT: Mr. Diener writes:
>
> "A 'Honest and Sincere in His Cause'—He is Guilty
>
> B Not 'Objectively Reasonably' He Is Guilty."
>
> Mr. Diener, I am a little unsure of what this expresses.
>
> JUROR DIENER: What I meant there was that his cause was honest and sincere, which he's guilty since we only had this one way—you know, he's guilty, he's—his honesty and sincerity is sincere.
>
> THE COURT: I see.
>
> JUROR DIENER: The other part —
>
> THE COURT: But not objectively reasonable?
>
> JUROR DIENER: (sic) Is guilty.
>
> THE COURT: Okay.
>
> JUROR DIENER: I was trying to bring that out to clarify—
>
> THE COURT: I see what you're saying. All right.

(*Appendix E* at 27; *Tr.* 1763-1765.)

The District Court sentenced petitioner to a year and a day in prison. The Court, however, permitted petitioner to remain free on bail pending appeal, stating: "I do not regard any appeal here as frivolous." (*Tr.* 1798.)

After affirming petitioner's convictions, the Seventh Circuit Court of Appeals granted his motion to stay its mandate pending this Court's ruling on the instant petition for a writ of *certiorari*. (*Order* of October 10, 1989, *Appendix F.*)

REASONS FOR GRANTING THE WRIT

I. Introduction

Petitioner John Cheek was convicted of specific intent felonies under jury instructions which required him, by way of defense, to show that his beliefs about his legal duties were not only sincerely and honestly held, but also "objectively reasonable." The supplemental jury instructions expressly told the jury that some of his proffered beliefs were, as a matter of law, not objectively reasonable. These instructions embodied the application of the Seventh Circuit's "objectively reasonable" standard for good faith defenses in income tax cases.

Clearly the jury had great difficulty applying the "objectively reasonable" standard to petitioner's case. Two of the jurors stated in notes to the Court that they believed that petitioner was sincere in his misunderstanding of his legal duties. All of the jurors signed the note which complained that the "objectively reasonable" standard was a "narrow and hard expression."

II. Reasons For Granting Certiorari

In this case, the Seventh Circuit itself acknowledges that its unique "objectively reasonable" test is in direct conflict with at least seven other Circuits, all of which espouse a subjective standard which allows a jury to determine a defendant's good faith *vel non* based on what the defendant (in the jury's view) honestly believes. This Court's Rule 17 sets out, as a reason for granting *certiorari*, that a Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of

Appeals on the same matter. Such is clearly the situation here.

Rule 17 also asks whether a Court of Appeals has decided an important question of Federal law which has not been but should be settled by this Court, or has decided a Federal question in a way in conflict with applicable decisions of this Court. Both criteria also apply. The Seventh Circuit not only has departed from the prevailing law in seven other Federal Circuits, but has also chosen to ignore fundamental criminal law holdings of this Court. This Court has consistently held, as a constitutional matter, that criminal intent is a jury question. *United States v. Pomponio*, 429 U.S. 10 (1976), *rehearing denied*, 429 U.S. 987 (1976); *Morissette v. United States*, 342 U.S. 246 (1952). This Court has also held that conclusive presumptions or instructions in criminal cases raise serious constitutional questions. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

The Seventh Circuit's contrary approach here has broad implications for the administration of criminal law, not only in tax cases but also (for example) in mail fraud and false statement cases, in which a defendant's good faith also figures as a valid defense.

Moreover, petitioner Cheek believes that the Seventh Circuit's unique "objectively reasonable" test has unfairly resulted in his felony conviction even though the jury clearly did *not* find that he possessed criminal intent at the time of his alleged offenses.

Only this Court can act to bring the Seventh Circuit into conformity with other Circuits and with this Court's own decisions.

III. Constitutional Principles

The crimes of which petitioner was convicted—tax evasion, failure to file tax returns, and filing a false claim—all require the Government to prove willfulness beyond a reasonable doubt. No one doubts that.

In *United States v. Pomponio*, 429 U.S. 10 (1976), *rehearing denied*, 429 U.S. 987 (1976), this Court squarely held that in a criminal tax case the Government must establish beyond a reasonable doubt that the defendant's actions were willful; that is, "a voluntary, intentional violation of a known legal duty."

In our system of justice, criminal intent is the cornerstone of criminal responsibility. *Morissette v. United States*, 342 U.S. 246 (1952). This Court in *Morissette* held that when intent is an element of the crime charged, its existence is a question of fact for the jury that cannot be taken from them by instructions from the court. Under our Constitution, it is the jury which decides the guilt or innocence and, particularly, the criminal intent of a defendant. This is a fundamental element of our jury guarantee of the Sixth Amendment. *Sandstrom v. Montana*, 442 U.S. 510 (1979) (conclusive presumptions which impinge upon this jury function violate the due process clause of the Fifth Amendment and invade the fact-finding function of the jury).

Our tax collection system, of which criminal prosecution is a part, has proceeded successfully for many years, consistent with these constitutional guarantees. The Seventh Circuit's change of heart in 1985—a pure attempt to unilaterally muzzle inconvenient dissent—cannot be allowed to overturn these well-established standards.[2]

In this case, petitioner Cheek's defense was good faith. The Seventh Circuit's "objectively reasonable" standard resulted in his jury being instructed not only that his good faith beliefs must be in addition "objectively reasonable" (*Appendix C*), but also, after the arguments and after the jury had begun deliberating, that certain of his beliefs were as a matter of law not "objectively reasonable" and could not constitute a defense. (*Appendix D* at 24 and 25-26.) These instructions violated *Morissette*, *Sandstrom*, and their progeny.

In *United States v. Murdock*, 290 U.S. 389 (1933), this Court said:

> Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.

See also Sansone v. United States, 380 U.S. 343 (1965) (criminal liability would attach if the defendant "knew that he should have reported more income than he did"). In *United States v. Bishop*, 412 U.S. 346 (1973), the Court embraced what three years later became the settled *Pomponio* formulation of willfulness: "a voluntary, intentional violation of a known legal duty." The Court added that, within the tax system, "degrees of negligence give rise

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[2] The "objectively reasonable" standard has been applied by the Seventh Circuit only to the so-called "tax protester" prosecutions. This term apparently loosely refers to persons who the government believes do not pay taxes for reasons of political protest. *See United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987).

to nothing more than civil penalties." *Pomponio* itself involved a taxpayer defense that the returns filed were not false, because the taxpayers believed that certain payments to them were loans, not dividends, and that questioned losses belonged to their partnership. This Court held, *inter alia*, that the defendants could not be found guilty if they actually believed as they claimed. No suggestion was made that in addition to a sincere actual belief defendants' position would have to be "objectively reasonable." Here, as in *Pomponio*, petitioner's defense was that he held certain beliefs as to his duty to file and as to his duty to report certain items as income. However, as required by the Seventh Circuit, the District Court instructed the jury that the petitioner's beliefs had to be "objectively reasonable,"[3] even if honestly held, in order to pass muster—and that some of those beliefs, however bona fide, were simply not permitted to be advanced.

IV. The Other Circuits

One would expect, and it is so, that other Circuits have applied *Pomponio* and its progeny to tax cases involving evasion and failure to file. In *United States v. Aitken*, 755 F.2d 188 (1st Cir. 1985), Judge Coffin collected both this Court's and the Circuit law to reject the Government's effort to engraft an "objectively reasonable" standard on tax cases, and reversed the defendant's conviction. Judge Coffin noted that in the context of the criminal tax laws: "The mistake of law defense has particular vitality, and the key is whether the defendant honestly held a mistaken

[3] No guidance was given the jury as to the meaning of "objectively reasonable" until the second supplemental instruction, which told the jury that certain of petitioner's proffered beliefs were *not* objectively reasonable.

belief as to what the law requires." 755 F.2d at 193. Other Circuits concur. *United States v. Kraeger*, 711 F.2d 6, 7 (2d Cir. 1983); *Yarborough v. United States*, 230 F.2d 56, 61 (4th Cir. 1956), *cert. denied*, 351 U.S. 969 (1956) ("ignorance of the law is no defense to crime, except that, where willfulness is an element of the crime, ignorance of a duty imposed by law may negate willfulness in failure to perform the duty"); *Mann v. United States*, 319 F.2d 404, 409-410 (5th Cir. 1963), *cert. denied*, 375 U.S. 986 (1964) (plain error to instruct the jury "to speculate as to what any other person . . . would reasonably have expected to be the consequences of his conduct"); *see also, United States v. Burton*, 737 F.2d 439, 441 (5th Cir. 1984) (holding that a taxpayer's claimed belief that wages are not income need not be objectively reasonable to constitute a defense); *Battjes v. United States*, 172 F.2d 1, 4 (6th Cir. 1949); *Cooley v. United States*, 501 F.2d 1249, 1253 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975) ("If a person acts without reasonable ground for belief that his conduct is lawful, it is for the jury to decide whether he acted in good faith or whether he willfully intended to fail to file a tax return"); *Haigler v. United States*, 172 F.2d 986, 989 (10th Cir. 1949) ("We think it irreconcilably inconsistent to say in one breath that guilty knowledge of the consequences of the act done is the essence of the offense and in the next breath say that ignorance of the consequences of those acts is no excuse"); *United States v. Ware*, 608 F.2d 400, 405 (10th Cir. 1979) (while good faith disagreement with the law is not a defense, a good faith misunderstanding of its requirements is). In the above seven Federal Circuits, a defendant accused of tax evasion or willful failure to file has a "good faith" defense. In those Circuits, the defendant does not have the added burden of convincing the jury that his beliefs, although sincerely held, are "objectively reasonable" (whatever that

may mean). And in those Circuits, the defendant does not face the obstacle that some of his beliefs may have been determined to be "unreasonable" as a matter of law.

V. The Seventh Circuit

Consistent with the prevailing view in this Court and in these seven Circuits, the Seventh Circuit originally applied the "subjectively reasonable" standard. ***E.g.***, *United States v. Matosky*, 421 F.2d 410, 413 (7th Cir. 1970), *cert. denied*, 398 U.S. 904 (1970), (nowhere suggesting that good faith had also to survive a "belief test" as "objectively reasonable"). It was not until *United States v. Moore*, 627 F.2d 830, 833 (7th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981), that the Seventh Circuit first mentioned that the mistake-of-law defense must be "objectively reasonable." As other Circuits have recognized, this statement was *dictum*. Indeed, notwithstanding *Moore*, no "objectively reasonable" instruction was given in the next several "tax protester" cases before the Seventh Circuit. *See United States v. Verkuilen*, 690 F.2d 648 (7th Cir. 1982); *United States v. Koliboski*, 732 F.2d 1328, 1329 (7th Cir. 1984). In fact, *United States v. Dack*, 747 F.2d 1172, 1175 (7th Cir. 1984), held—consistent with the other Circuits—that in a failure to file tax case a defendant's beliefs, even if unreasonable, can constitute a defense.[4]

Then came four cases in 1985 and 1986. These cases departed from the view in other Circuits, and also from the Seventh Circuit's *Dack* opinion, by announcing the "objectively reasonable" standard as the law of the Seventh Circuit. *United States v. Thibodeaux*, 758 F.2d 199 (7th Cir. 1985); *United States v. Witvoet*, 767 F.2d 338, 340 (7th Cir. 1985); *United States v. Bressler*, 772 F.2d 287, 290 (7th Cir. 1986), *cert. denied*, 474 U.S. 1082 (1986); *United States v. Thomas*, 788 F.2d 1250, 1253 (7th Cir. 1986), *cert. denied*, 479 U.S. 853 (1986). In all four cases, the Government's proffered "objectively reasonable" instruction was given. In all four cases, the Seventh Circuit held that a proper objection had not been made and that this instruction was not plain error, given all the facts of those cases. In the next three such cases, the "objectively reasonable" instruction, although mentioned, was not squarely dealt with. *United States v. Foster*, 789 F.2d 457, 461 (7th Cir. 1986), *cert. denied*, 479 U.S. 883 (1986); *United States v. Ferguson*, 793 F.2d 828, 831 (7th Cir. 1986), *cert. denied*, 479 U.S. 933 (1986); and *United States v. Sato*, 814 F.2d 449, 451 (7th Cir. 1987), *cert. denied*, 108 S.Ct. 294, 98 L.Ed. 254 (1987). Not until 1987, in *United States v. Dube*, 820 F.2d 886 (7th Cir. 1987), and *United States v. Davenport*, 824 F.2d 1511, 1517 (7th Cir. 1987), did the Seventh Circuit expressly embrace the "objectively reasonable" standard—regardless of the law in other Circuits, and regardless of earlier Seventh Circuit law. The crowning blow was *United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987), in which the Seventh Circuit approved the Government's "preemptive strike," in which a number of potential willfulness defenses were precluded before trial as objectively unreasonable as a matter of law.[5] *Dube*, *Davenport*, and *Buckner*, are ex-

[4] "We agree that Dack was entitled to an acquittal if he could demonstrate a bona fide belief in the necessity of a tax assessment, even if that belief was objectively unreasonable." *Dack* at 1175.

[5] Petitioner's alleged offenses occurred from 1981 through 1987. During this period, the elements of the defenses to these charges changed in the Seventh Circuit, from *Moore* to *Dack*, then back to *Witvoet*. There are serious *ex post facto* problems in applying 1985 legal standards to a 1984 alleged offense, for example.

pressions of impatience with tax protesters, and single out this type of defendant for extraordinarily harsh treatment. In a contemporaneous civil case, the Seventh Circuit anathematized tax protesters as "thorns in the side of the federal judiciary." *McLaughlin v. Commissioner*, 832 F.2d 986 (7th Cir. 1987).[6] Yet we do not—do we?—throw "cranks" in jail as a handy means of shutting them up.

Even the Seventh Circuit has not suggested that its unique second-guessing of beliefs applies to anyone other than inconvenient tax protesters. The Seventh Circuit has not been impelled to such second-guessing in any other kinds of tax cases, or in other cases in which specific intent is an element and in which good faith can be a defense, such as mail fraud cases and false statement cases. Indeed, in this case the District Court told petitioner, after sentencing him to prison, that he could fill out the Government forms as he believed: "Nobody will charge you with perjury, if you honestly believe something and you turn out to be mistaken." (*Tr.* 1800.)

VI. Implications Of The "Objectively Reasonable" Standard

Enough. We have juries. They are the oil—sometimes unwanted, but the fabric of what we are—on the hinges of our judicial system. It is for them, not a panel of professionals (a governmental agency to boot), to decide whether Cheek believes what he says. No doubt he is an uncomfortable "thorn in the side." But we have built a nation on the view that however annoying he may be, he is *not*, if he can convince a jury of his *bona fides*, a

[6] Even "tax protestors," of course, are entitled to due process and a jury trial on a criminal charge.

criminal.[7] In any other Circuit, he would have been heard. In the Seventh Circuit, the jury was forbidden to listen as a matter of law.

The questions from the jurors during their deliberations and the notes which they tendered to the Court show that at least some jurors were convinced that petitioner sincerely held his beliefs (however uncomfortable). The District Court's supplemental instruction, given to solve the jury's dilemma, barred the jurors from accepting many of petitioner's good faith beliefs as a defense. Even the District Court was troubled by that harsh rule: "If you're in Mr. Cheek's position, is it the law in this circuit now that a tax protester has no defense?" *Tr.* 1786. (The Government said, in substance, "yes.") At sentencing, the District Judge added: ". . . I do not want to sentence you for beliefs that I believe were honestly held, although I believe foolishly held." (*March 16, 1988 Tr.* 4.) *See also United States v. Wojtas*, 611 F.Supp. 118, 122 (N.D. Ill. 1985). ("As it happens, this Court believes an objective standard of 'reasonable belief' is incorrect.")

Even the Department of Justice in recommending tax case instructions to United States Attorneys' Offices throughout the country, has said no to the Seventh Circuit's view. *See* CRIMINAL TAX MANUAL, U.S. Dept. of Justice—Tax Division, Criminal Section, U.S. Gov't Printing Office, 1986 Ed. (Proposed Instruction No. 87 for violation of Title 26, U.S.C., Sec. 7203). Nowhere in that Manual does the Department urge prosecutors to include the requirement that a defendant's beliefs be "objectively reasonable."

[7] There are, of course, myriad civil and administrative penalties which can be imposed in a tax matter regardless of the presence of criminal intent.

The Seventh Circuit's "objectively reasonable" standard is an anomaly. It does not exist in prior holdings of this Court. Even the Department of Justice does not espouse it.

Petitioner Cheek—or anyone else, however unpopular or a "crank"—should not be subjected to a uniquely paternalistic view which every other Circuit which has considered the question has found unpersuasive, and which this Court has held impermissible. We do not undertake to control beliefs. Only this Court can make that plain to the Seventh Circuit.

CONCLUSION

For the foregoing reasons, petitioner John L. Cheek respectfully requests this Court to grant this Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit, and to reverse the conviction of petitioner John L. Cheek.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-1582

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN L. CHEEK,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 CR 161—**Paul E. Plunkett,** *Judge.*

ARGUED DECEMBER 6, 1988—DECIDED AUGUST 21, 1989

Before COFFEY, MANION, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* Defendant-appellant John L. Cheek appeals his conviction of three counts of tax evasion, one count of false claims against the government for income tax withheld, and six counts of willful failure to file individual tax returns. He challenges his conviction on numerous grounds. Chief among these grounds are the arguments that the district court erred in instructing the jury on his theory of defense, and that the district

court's reinstruction of the jury was improper. For the reasons discussed below, we affirm.

I. Facts

Defendant John L. Cheek is a pilot for American Airlines, where he has worked since 1973. From 1969 to 1979, he properly filed tax returns. For the tax years of 1980 through 1986, however, he did not file tax returns, except for 1982, when he filed a frivolous return. From January, 1980, to January, 1981, he filed frivolous W-4 forms claiming an increasing number of withholding allowances, eventually claiming as many as 60. Thereafter, he claimed on his W-4 form that he was exempt completely from taxation.

During this time, Cheek also filed civil suits against American Airlines and the Internal Revenue Service. The suit against American Airlines claimed that taxes were wrongly withheld by American from his wages. In his suit against the IRS, Cheek claimed, for various reasons, that he was not required to pay any income tax. In one of these cases, not only did the district court find Cheek's position frivolous, but also fined him $10,000.00 (subsequently reduced on appeal to $5,000.00) for bringing this suit. *See Cheek v. Doe*, 828 F.2d 395 (7th Cir.), *cert. denied*, ___ U.S. ___, 108 S. Ct. 349, 98 L. Ed. 2d 374 (1987). Cheek also appeared at the criminal tax trials of other persons.

On March 9, 1987, Cheek was indicted with three counts of tax evasion for the tax years 1980, 1981, and 1983 (in violation of 26 U.S.C. § 7201), one count of false claims against the government for income tax withheld in 1982 (in violation of 18 U.S.C. § 287), and six counts of willful failure to file income tax returns for the tax years 1980, 1981, 1983, 1984, 1985 and 1986 (in violation of 26 U.S.C. § 7203).

Before closing arguments in the trial, Judge Plunkett conducted a jury instruction conference. Among the instructions he discussed was proposed Government Instruction No. 38. This instruction read:

> A person's opinion that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the law. Furthermore, a person's disagreement with the government's tax collection system and policies does not constitute a good faith misunderstanding of the law.

The trial judge then modified this instruction. Given to the jury as Jury Instruction No. 32, this instruction now read:

> An objectively reasonable good faith misunderstanding of the law negates willfulness. An objectively reasonable good faith misreading of the law may be based upon the defendant's own legal research or an attorney's advice. Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct. It requires that the defendant honestly and reasonably believe his research or the advice, and believe that it is correct and relies upon it.
>
> Disagreement with the law does not constitute a good faith misunderstanding of the law because it is the duty of all persons to obey the law whether or not they agree with it. Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

Also given to the jury was Instruction No. 53, Cheek's theory of defense instruction. The court had drafted this instruction for Cheek. It discussed, among other things, Cheek's belief that he was not a taxpayer, that his wages did not constitute income, and that he was not required to file tax returns.

The jury began its deliberations on the morning of November 10. At 3:00 that afternoon, it sent out a note asking for a transcript of Cheek's testimony in which he discussed his beliefs. The court denied this request. At about 4:15 p.m., the jury sent out a second note. This note stated in part:

> We have a basic disagreement between some of us as to if Mr. Cheek honestly and reasonably believed that he was not required to pay income taxes . . . Page 32 [the modified Government Instruction No. 38] discusses good faith misunderstanding and disagreement. Is there any clarification you can give us on this point? Page 53 [presumably Jury Instruction No. 53] is the one we cannot get by as to his belief.

In the ensuing discussion about this note, the government pointed out to the court that in revising Government Instruction No. 38, the court had eliminated the statements that a person's opinion that the tax laws violate his constitutional rights and a person's disagreement with the government's tax collection do not constitute a good faith misunderstanding of the law. Judge Plunkett's response to the jury's note included a supplemental instruction with these missing statements.

At 7:10 p.m. that day, the jury sent out another note saying that it still could not reach a decision because "we are divided on the issue as to if Mr. Cheek honestly and reasonably believed that he was not required to pay income tax." When the jurors resumed deliberating on November 12, the government moved for the court to clarify its instructions to the jury before it resumed its deliberations. Judge Plunkett agreed with this request, and gave the jury a second additional instruction. This instruction stated that "an honest but unreasonable belief is not a defense [to the charges] and does not negate willfulness," and that "advice or research resulting in a conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense." Coupled with this instruction was the *Silvern* instruction (commonly referred

to as the "dynamite" or "blasting" charge), which the court previously had given to the jury.[1]

Two and-a-half hours later, the jury returned with its verdict. With this verdict, it included several notes that it wanted the court to read after the verdict was read. Before reading any of the notes, the court clerk read the guilty verdict aloud, and the judge polled the jury. Each of the jurors affirmed that the guilty verdict was his or her own. After reading the notes, the judge polled the jurors once again. None of them indicated any disagreement with the verdict.

The first note, signed by all twelve jurors, stated that they found defendant "guilty as charged on all counts" and that some jurors wished to express their personal opinions—opinions "not meant to affect in any way their verdict of guilty." It said that these notes were given to

---

[1] This instruction provides:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest convictions as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

United States v. Silvern, 484 F.2d 879, 883 (7th Cir. 1973) (*en banc*); *see also United States v. Sblendorio*, 830 F.2d 1382, 1386-90 (7th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1034, 98 L. Ed. 2d 998 (1988).

the judge as "a complaint against the narrow and hard expression under the constraints of the law." Another one of these notes said: "I know the gentleman is guilty of a crime. However, I honestly believe he believed so deeply in his cause that he has risked everything for this cause and truly does not believe that he is breaking the law." The last note said: "(A) 'Honest and Sincere in his Cause'—He is *Guilty*" and "(B) Not 'Objectively Reasonable' He is *Guilty*."

Cheek now raises numerous challenges to his conviction. Only two of these merit discussion in detail. These are Cheek's challenge to the notion that the standard of whether his belief that he was not breaking the law was valid was one of "objective reasonableness," and his argument that it was error for the district court to have reinstructed the jury.

II. Discussion

A. *Instructions to the Jury*

1. *Use of the "Objectively Reasonable" Standard*

All of the crimes of which Cheek was convicted require willfulness. In *United States v. Pomponio*, 429 U.S. 10, 97 S. Ct. 22, 50 L. Ed. 2d 12 (1976), the Supreme Court held that "willfully in the context of the Internal Revenue Code" simply means "a voluntary, intentional violation of a known legal duty." *Id.* at 12, 97 S. Ct. at 23. Under the proper circumstances, however, a good faith misunderstanding of the law may negate willfulness. *See, e.g., United States v. Bressler*, 772 F.2d 287, 290 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082, 106 S. Ct. 852, 88 L. Ed. 2d 892 (1986). Cheek argues that the district court erred in instructing the jury that such a good faith misunderstanding of the law must be "objectively reasonable." Cheek contends that every other circuit that has ruled on the issue of whether a good faith misunderstanding of the law must be objectively reasonable has decided to the contrary, and has adhered to a subjective standard of reasonableness. *See, e.g., United States v. Whiteside*,

810 F.2d 1306, 1310 (5th Cir. 1987); *United States v. Phillips*, 775 F.2d 262, 264 (10th Cir. 1985); *United States v. Aitken*, 755 F.2d 188, 191 (1st Cir. 1985); *Cooley v. United States*, 501 F.2d 1249, 1253 n.4 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123, 95 S. Ct. 809, 42 L. Ed. 2d 824 (1975); *Yarborough v. United States*, 230 F.2d 56, 61 (4th Cir.), *cert. denied*, 351 U.S. 969, 76 S. Ct. 1034, 100 L. Ed. 1487 (1956); *Battjes v. United States*, 172 F.2d 1, 4 (6th Cir. 1949); *see also United States v. Kraeger*, 711 F.2d 6, 7 (2d Cir. 1983) (good faith misunderstanding of the law negates willfulness, but a good faith disagreement does not); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 97 (2d Cir.), *cert. denied*, 462 U.S. 1131, 103 S. Ct. 3111, 77 L. Ed. 2d 1366 (1983) (defendant's subjective intent is a jury question).

Regardless of what the other circuits have ruled on this issue, this circuit has, in recent years, emphatically adhered to the "objectively reasonable" standard. *See, e.g., United States v. Buckner*, 830 F.2d 102, 103 (7th Cir. 1987); *United States v. Davenport*, 824 F.2d 1511, 1517-18 (7th Cir. 1987); *Bressler*, 772 F.2d at 290; *United States v. Moore*, 627 F.2d 830, 833 (7th Cir. 1980), *cert. denied*, 450 U.S. 916, 101 S. Ct. 1360, 67 L. Ed. 2d 342 (1981). To the extent that this court's opinion in *United States v. Dack*, 747 F.2d 1172, 1175 (7th Cir. 1984) could be interpreted to mean that an "objectively unreasonable" belief can negate willfulness, our later cases have made it clear that this is not so. Thus, the district court did not err in instructing the jury that an "objectively reasonable" good faith misunderstanding of the law negates willfulness.

2. *Reinstruction of the Jury*

Cheek next argues that the district court erred in reinstructing the jury, particularly where this reinstruction was not solicited by it. He raises numerous challenges to this reinstruction, and we address these challenges in turn.

In *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S. Ct. 402, 405, 90 L. Ed. 350 (1946), the Supreme Court said, "When a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy." Cheek contends that the district court's reinstruction of the jury violated this principle. This is because, Cheek claims, the jury's notes to the judge when it was having difficulty in reaching a verdict were not explicit about what its difficulties with the instructions at issue were. Cheek contends that in reinstructing the jury, the district court (and the government as well) merely guessed at the jury's difficulties.

We disagree. Once it is clear that a jury has difficulties concerning the original instructions, reinstruction is appropriate. *Cf. United States v. Zabic*, 745 F.2d 464, 475 (7th Cir. 1984) (once questions arose among the jurors concerning the original instructions, " '[t]he trial court [had to] exercise its sound discretion in determining what type of supplementary instructions should be given to a deliberating jury that seeks clarification of the law.' ") (citation omitted). Of course, whether or not to give reinstruction at all is within the discretion of the trial court. *United States v. Castenada*, 555 F.2d 605, 611 (7th Cir.), *cert. denied*, 434 U.S. 847, 98 S. Ct. 152, 54 L. Ed. 2d 113 (1977); *United States v. Braverman*, 522 F.2d 218, 224 (7th Cir.), *cert. denied*, 423 U.S. 985, 96 S. Ct. 392, 46 L. Ed. 2d 302 (1975). The character and extent of supplementary instructions, moreover, rests within the sound discretion of the trial court. *United States v. Keck*, 773 F.2d 759, 768 (7th Cir. 1985); *accord Zabic*, 745 F.2d at 475 (quoting *Davis v. Greer*, 675 F.2d 141, 145 (7th Cir.), *cert. denied*, 459 U.S. 975, 103 S. Ct. 310, 74 L. Ed. 2d 289 (1982)); *Castenada*, 555 F.2d at 611; *Braverman*, 522 F.2d at 224. In *United States v. Franco*, 874 F.2d 1136 (7th Cir. 1989), we set forth the factors upon which we focus in reviewing supplemental jury instructions. These are: whether the instructions as a whole fairly and adequately treat the issues, whether the instructions are a correct statement of the law, and whether the district court answered the jury's questions specifically. *Id.* at 1143 (citations omitted).

In this case, the district court did not abuse its discretion in deciding to reinstruct the jury on two occasions. It is apparent, contrary to Cheek's assertions, what the difficulties of the jury were. The jury clearly was focusing on the conflict between Jury Instruction No. 32 (an objectively reasonable good faith misunderstanding of the law negates willfulness) and Jury Instruction No. 53 (Cheek's theory of defense instruction, containing his beliefs). Jury Instruction No. 32 was incomplete without mentioning that beliefs that the tax laws are unconstitutional and that wages are not income, and disagreement with the government's tax collection systems and policies, do not constitute good faith misunderstandings of the law. Under *Bollenbach*, Judge Plunkett's reinstructions responded directly to the difficulties of the jury as set out by them, by providing more explicit instructions as to what constituted an objectively reasonable good faith misunderstanding of the law. None of these supplemental instructions, moreover, misstated the law in this circuit. As discussed above, a good faith misunderstanding of the law must be objectively reasonable. Moreover, the beliefs that wages are not income and that the tax laws are unconstitutional are not objectively reasonable as a matter of law. *Buckner*, 830 F.2d at 103-04; *United States v. Latham*, 754 F.2d 747, 750-51 (7th Cir. 1985); *Moore*, 627 F.2d at 833.[2]

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[2] For the record, we note that the following beliefs, which are stock arguments of the tax protester movement, have not been, nor ever will be, considered "objectively reasonable" in this circuit:

(1) the belief that the sixteenth amendment to the constitution was improperly ratified and therefore never came into being;

(2) the belief that the sixteenth amendment is unconstitutional generally;

(3) the belief that the income tax violates the takings clause of the fifth amendment;

(4) the belief that the tax laws are unconstitutional;

(Footnote continued on following page)

The original instructions in this case were incomplete and misleading, but the addition of the supplemental instructions gave the jury a correct statement of the law in this circuit. As in *Zabic*, once the jurors raised questions, the trial judge properly exercised his discretion by providing the jurors with an accurate, specific, statement of the controlling law. 745 F.2d at 475. As we discuss below, no defendant is entitled to an instruction that incorrectly states the law.[3]

The fact that the district court's second reinstruction of the jury was not specifically solicited by it, moreover,

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[2] *continued*

(5) the belief that wages are not income and therefore are not subject to federal income tax laws;

(6) the belief that filing a tax return violates the privilege against self-incrimination; and

(7) the belief that Federal Reserve Notes do not constitute cash or income.

Miller v. United States, 868 F.2d 236, 239-41 (7th Cir. 1989); *Buckner*, 830 F.2d at 102; *United States v. Dube*, 820 F.2d 886, 891 (7th Cir. 1987); *Coleman v. Comm'r*, 791 F.2d 68, 70-71 (7th Cir. 1986); *Moore*, 627 F.2d at 833. We have no doubt that this list will increase with time.

We also reject another absurd argument of Cheek's, made under the rubric of "subject matter jurisdiction," that he is not a "fourteenth amendment citizen," but rather a white male Christian with inherent and inalienable rights as defined in Article 1, Section 1 of the Illinois Constitution, and thus the federal government cannot tax his wages directly for the privilege of citizenship. This argument has no merit whatsoever. *Cf. United States v. Studley*, 783 F.2d 934, 937 (9th Cir. 1986) (rejecting the argument that taxpayer was an "absolute, free-born and natural individual," and therefore not subject to the tax laws).

[3] We believe that one could conclude, erroneously, from reading the theory of defense instruction given in this case, that Cheek's beliefs could be legally correct. Therefore, we suggest that when district judges give theory of defense instructions containing any beliefs that are incorrect as a matter of law (regardless of whether these beliefs are objectively reasonable), they should inform the jury of this fact within the theory of defense instruction.

does not constitute reversible error in this case. As discussed above, the reinstruction of the jury had the desired effect of resolving the jury's difficulties with the original, unclear instructions. *Cf. United States v. Cheramie*, 520 F.2d 325, 332-33 (5th Cir. 1975).

Cheek also argues that the district court's reinstruction of the jury violated Rule 30 of the Federal Rules of Criminal Procedure. This rule provided at that time,[4] in part:

> At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.

Technical violations of Rule 30, assuming that one occurred here, require reversal only where the defendant can show actual prejudice. *United States v. Baker*, 722 F.2d 343, 346 (7th Cir. 1983), *cert. denied*, 465 U.S. 1037, 104 S. Ct. 1312, 79 L. Ed. 2d 709 (1984). Cheek presents three reasons why he was prejudiced by the district court's reinstruction of the jury under Rule 30. We reject all of these reasons.

First, Cheek argues that the reinstruction had the effect of changing the "law of the case" to a direction that his beliefs did not constitute a defense. We find this argument to be without merit. First, as noted above, the district court's reinstruction of the jury corrected its earlier, confusing and unclear instructions. A defendant is not entitled to have the jury instructed incorrectly on the law. *Cf. Baker*, 722 F.2d at 347 (defendant was not unfairly prejudiced under Rule 30 by the trial judge's decision to correct an incorrect instruction; defendant was never entitled to an instruction referring only to embezzle-

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[4] This rule was amended effective August 1, 1988.

ment). Moreover, we note with approval the words of the Fifth Circuit in *Cheramie*:

> Admittedly, these [instructions] helped guide the jury to a verdict. Yet, that assistance is the purpose of jury instructions. Moreover, these additional instructions, whose use remains within the sound discretion of the court, . . . correctly, and without prejudice to the defendant, reflected the state of the law.

520 F.2d at 332 (citations omitted).

Second, Cheek argues that the district court's reinstruction of the jury in violation of Rule 30 prejudiced him because he was unable to readdress the jury to explain his defense in light of the new instruction. As the government points out, however, Cheek's closing argument did not rely on any statements of law in the original jury instructions which might have been qualified by the supplemental instructions. Thus, Cheek was not prejudiced in this manner. *Baker*, 722 F.2d at 346.

Finally, Cheek argues that the reinstruction misstated his theory of defense and then directed the jury that this theory was not acceptable. We disagree with Cheek, as a preliminary matter, that the district court's reinstruction of the jury misstated his defense. The district court's original instruction to the jury on Cheek's theory of defense, Jury Instruction No. 53, was drafted by the court for Cheek and not rejected by him. This theory of defense instruction indicated, among other things, that Cheek's theory was that he "acted at all times in good faith—that is, that he honestly and reasonably believed that he was not required to file tax returns," that Cheek had "been attempting to test the constitutionality of the income tax laws," and that "Cheek [contended] that his wages from . . . American Airlines . . . do not constitute income under the Internal Revenue Service laws." Moreover, as discussed above, the reinstruction properly corrected the earlier, misleading, instruction. Thus, we do not think that Cheek was prejudiced in this regard by the reinstruction.

B. *Cheek's Other Contentions*

As noted above, Cheek raises a number of other challenges to his conviction. These challenges all are without merit, and hence do not require discussion. *Buckner*, 830 F.2d at 104. Nonetheless, we address a few of them briefly.

First, the district court clearly had jurisdiction of this case under 18 U.S.C. § 3231, which provides that the federal district courts have exclusive original jurisdiction over "all offenses against the laws of the United States." Sections 7201 through 7210 of Title 26 of the United States Code, as well as 18 U.S.C. § 287, are offenses against the laws of the United States. This court previously rejected any arguments to the contrary (with respect to Sections 7201-10, but this is equally applicable to 18 U.S.C. § 287 as well) in *United States v. Koliboski*, 732 F.2d 1328, 1329-30 (7th Cir. 1984). Other circuits too numerous to mention also have rejected this argument.

Second, Cheek argues that he was denied his right to counsel under the sixth amendment to the Constitution because he "could not find trial counsel with expertise on the Constitution and the Internal Revenue Code," and because his "friends were only allowed to act as helpers during certain stages of the trial." This argument is without merit. In *United States v. Thibodeaux*, 758 F.2d 199, 201 (7th Cir. 1985), this court specifically held that "[t]here is no constitutional right . . . to representation by non-lawyers or laymen." *Id.* at 201. In this case, the district court was even more generous than it need have been, for it permitted Cheek to have his friends sit with him at counsel table. In *Thibodeaux*, we noted that district courts need not permit this practice. *Id.*

Moreover, the district judge only insisted on proceeding without Cheek being represented by counsel after he had granted Cheek numerous continuances in order that he could find counsel. The court also suggested that Cheek consult with friends about attorneys, and even mentioned to Cheek the name of an attorney who had tried a tax protester case before the court (Tr. March 30, 1987 at 5;

Tr. May 19, 1987 at 7). This case also is similar to *Thibodeaux* in this respect. In that case, we held that the right to counsel may be waived if one able to afford counsel does not retain an attorney within a reasonable period of time. *Id.* Thus, we do not find that Cheek was denied effective assistance of counsel.

Third, we reject Cheek's argument that the government's evidence was insufficient as to his intent to violate the law. Cheek argues that the jury note which said that Cheek "truly does not believe that he is breaking the law" contradicts and negates the jury verdict of guilty. We reject this argument out of hand. Federal Rule of Evidence 606(b) provides that jurors may neither testify about nor provide affidavits concerning their mental processes. This court previously has interpreted this rule to mean that counsel may not, in most instances, offer the mental processes of jurors to impeach verdicts. *United States v. Sblendorio*, 830 F.2d 1382, 1389-90 (7th Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 1034, 98 L. Ed. 2d 998 (1988) *and cases cited therein* ("A court will not inquire into the jury's deliberative process in the absence of a claim of external influence"); *United States v. Schwartz*, 787 F.2d 257, 261-62 (7th Cir. 1986) (jurors may only testify about "extraneous prejudicial information" or any "outside influence").[5]

Finally, we find that Cheek's numerous evidentiary objections are without merit. Even if the district court committed any error with respect to the admission of evidence, this error was harmless because of the overwhelming evidence of Cheek's guilt. *Cf. United States v. Manganellis*, 864 F.2d 528, 539 (7th Cir. 1988) ("An error is harmless

[5] Even if this were not so, the poll of the jury both before and after these notes were read indicates that their verdict truly was unanimous. The jury's notes, if anything, indicated that they were dissatisfied with the law, but that they nonetheless followed it as instructed. One of these notes even stated that any additional "opinions" were "not meant to affect in any way their verdict of guilty."

if the other untainted incriminating evidence is overwhelming"). Likewise, even if the district court erroneously refused to admit certain items of Cheek's proffered evidence, or improperly refused to let evidence which was admitted, but mislaid and not located until the jury began deliberating, go back to the jury, this was harmless error. This is not a case where the complained-of exclusion of evidence had a substantial effect on the jury's verdict by precluding Cheek from presenting his defense. *Cf. United States v. Peak*, 856 F.2d 825, 834-35 (7th Cir.), *cert. denied*, ____ U.S. ____, 109 S. Ct. 499, 102 L. Ed. 2d 535 (1988).

III. **Conclusion**

We conclude that the district court correctly instructed the jury that only an "objectively reasonable" good faith misunderstanding of the law negates willfulness. Moreover, the district court did not err in reinstructing the jury. Finally, this court had subject matter jurisdiction, Cheek was not denied effective assistance of counsel, the jury's notes did not "negate" its verdict of guilty, and Cheek's evidentiary objections are without merit.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 21, 1989.

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL A. KANNE, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 88-1582 vs.

JOHN L. CHEEK,

Defendant-Appellant.

Appeal from the No. Dist. of IL., East. Div.
No. 87 CR 161
Paul E. Plunkett, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

APPENDIX B

Judgment and Probation/Commitment Order of the United States District Court

[Page 1 of 2]

United States of America vs. JOHN L. CHEEK	United States District Court for Northern District of Illinois, Docket No. 87 CR 161-1

JUDGMENT AND
PROBATION/COMMITMENT ORDER

COUNSEL–
In the presence of the attorney for the government the defendant appeared in person on this date March 16, 1988.

_X_ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

___ WITH COUNSEL

PLEA–
___ GUILTY, and the court being satisfied that there is a factual basis for the plea,
___ NOLO CONTENDERE,
_X_ NOT GUILTY

FINDING & JUDGMENT–
There being a verdict of
___ NOT GUILTY. Defendant is discharged
_X_ GUILTY.

Defendant has been convicted as charged of the offense(s) of knowingly, willfully and unlawfully attempted to evade tax; willful failure to pay tax; willful failure to file; and false claims, as charged in all counts of the Indictment. IN VIOLATION OF TITLE 26, U.S. CODE, SECTIONS 7201, 7202 and 7303 and IN VIOLATION OF TITLE 18, U.S. CODE, SECTION 287.

SENTENCE OR PROBATION ORDER–
The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR AND One (1) DAY on each of Counts 1, 3 and 5. Said sentence on Counts 1, 3, 5 to run concurrently with each other.
IT IS ADJUDGED that on each of Counts 2, 4, and 6 through 10 the defendant is placed on probation for a period of FIVE (5) YEARS, on condition that he comply with the general conditions of probation. Said sentence on Counts 2, 4 and 6 through 10 to run concurrently with each other and consecutively with the sentence imposed on Counts 1, 3 and 5.

SPECIAL CONDITIONS OF PROBATION–
IT IS FURTHER ORDERED that the following conditions be imposed on probation:

1. defendant make his best efforts to pay back taxes, interests and penalties and to file future income tax returns on a timely basis
2. defendant to submit to an examination under oath with regards to his assets, by March 23, 1988.

IT IS FURTHER ORDERED that defendant pay a mandatory assessment for the costs of prosecution in the amount of $3,576.66

* * * * *

[Page 2 of 2]

* * * * *

SENTENCE OR PROBATION ORDER–
IT IS FURTHER ORDERED pursuant to 18 U.S.C. Section 3013(a) that the defendant is assessed the sum of $25.00 on each of Counts 7, 8, 9 and 10 and the sum of $50.00 on each of Counts 1, 3, 5 and 6 for a total assessment of $300.00.

IT IS FURTHER ORDERED that imposition of sentence is stayed pending appeal.

* * * * *

/s/ PAUL E. PLUNKETT
U.S. District Judge

Date March 16, 1988

APPENDIX C

Initial District Court Jury Instructions on Willfulness

Trial Transcript, p. 1684;
Government Instruction No. 32:

An objectively reasonable good faith misunderstanding of the law negates willfulness. An objectively reasonable good faith misreading of the law may be based upon the defendant's own legal research or an attorney's advice. Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct. It requires that the defendant honestly and reasonably believe his research or the advice, and believe that it is correct and relies upon it.

Disagreement with the law does not constitute a good faith misunderstanding of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

* * * * *

Trial Transcript, p. 1688;
Government Instruction No. 48:

* * * * *

When used in these instructions the term "willfully" means a voluntary, intentional violation of a known legal duty, as distinguished from a violation which is accidental, inadvertent or negligent. In establishing that the defendant acted willfully it is not required that the government show that the defendant had a bad purpose.

* * * * *

Trial Transcript, pp. 1690-1691;
Instruction No. 53:

* * * * *

It is the defendant John Cheek's theory that he did not willfully fail to file tax returns for the years 1980, '81, '83, '84, '85, '86, nor did he willfully attempt to evade and defeat the income taxes for the years 1980 through 1983.

Mr. Cheek's theory is that he acted at all times in good faith, that is, that he honestly and reasonably believed he was not required to file tax returns. Mr. Cheek contends that he honestly and reasonably believes he is not a taxpayer. He also contends that he has been attempting to test the constitutionality of the income tax laws as well as the applicability of the tax laws to him and he cannot do so by filing tax returns.

Mr. Cheek contends that his lawsuits against American Airlines and the Internal Revenue Service, his extensive legal research and his frequent conversations with several attorneys, including a written opinion from an attorney Robert L. Collins, demonstrate that he has an honest and reasonable belief that he is not required to file tax returns.

Among other things, Mr. Cheek contends that his wages from a private employer, American Airlines, does not constitute income under the Internal Revenue Service laws. Mr. Cheek also contends that his membership in MACBA and MCBA and his filings of W-4s with the Internal Revenue Service claiming 30 or 60 withholding allowances, as well as claiming exempt status, were not designed or intended to evade federal income taxes because he has contended since 1980 that he is not required to file tax returns or to pay federal income taxes.

If you find that Mr. Cheek honestly and reasonably believed that he was not required to pay income taxes or to file tax returns, then you should find Mr. Cheek not guilty of all the charges.

* * * * *

APPENDIX D

Notes from the Jury during Deliberations and Corresponding Supplemental Instructions

D(1) Jury Note of 4:15 p.m., November 10, 1987, and Court's Supplemental Instruction:

Trial Transcript, pp. 1705-1706;
Note from the Jury:

* * * * *

(The following further proceedings were had herein at 4:33 o'clock, p.m.:)

THE COURT: I have the following communication from the jury, which I got about 15 minutes ago:

"Judge Plunkett:

"We as a jury have been unable to agree on a unanimous verdict.

"We have a basic disagreement between some of us as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income taxes.

"We have struggled with this point for part of the morning & the entire afternoon with no movement.

"Page 32 discusses good faith misunderstanding & disagreement. Is there any additional clarification you can give us on this point?

"Page 53 is the one we cannot get by as to his belief.

"James R. Burgener"

* * * * *

Trial Transcript, pp. 1723-1724;
Court's Supplemental Instruction:

* * * * *

THE COURT: Miss Safford, I was going to add to the instruction the following language, "You have asked for a clarification of page 32 of the instructions discussing good faith misunderstanding and disagreement. As I instructed you, an objectively reasonable good faith misunderstanding of the law negates willfulness. However, a person's opinion that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the law. Furthermore, a person's disagreement with the government's tax collection systems and policies does not constitute a good faith misunderstanding of the law. This additional instruction should be read and considered with all the other instructions in considering your verdict.

"The government has the burden of proving willfulness beyond a reasonable doubt."

* * * * *

D(2) Jury Note of 7:10 p.m., November 10, 1987, and Court's Supplemental Instruction:

Trial Transcript, p. 1726;
Note from the Jury:

* * * * *

(THE FOLLOWING FURTHER PROCEEDINGS were had herein, in chambers, at 7:20 o'clock, p.m. of the same date:)

THE COURT: All right. The jury writes me at 7:10:

> "We, the jury, are unable to reach a decision. We are all in agreement that Mr. Cheek did not file tax returns in the years charged. We are all in agreement that Mr. Cheek filed incorrect W-4 forms. We

> are divided on the issue as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income tax. We feel that no amount of deliberation will reach a unanimous decision."

It is signed by Mr. Burgener and the 11 other jurors.

* * * * *

Trial Transcript, pp. 1757-1759;
Court's Supplemental Instruction:

* * * * *

THE COURT: Folks, I am going to give you a couple of additional instructions and then reread one I gave to you earlier. It is in response to a question the jury sent me two days ago about clarifying for you an honest and reasonable belief, and when I answered that I sent an answer which was not as complete as it should have been, and, accordingly, I am going to answer that question in a more complete manner by these additional instructions.

Ladies and gentlemen of the jury, an objectively reasonable good faith misunderstanding of the law negates willfulness. Whenever the word "reasonable" is used in these instructions it means objectively reasonable.

I instructed you that if you find Mr. Cheek honestly and reasonably believed he was not required to pay income taxes or to file tax returns you should find Mr. Cheek not guilty of all the charges.

To find Mr. Cheek not guilty under that instruction you must find both that Mr. Cheek held the belief honestly and that his belief was objectively reasonable.

An objectively reasonable belief means a belief held by a reasonable person acting reasonably. An honest but unreasonable belief is not a defense and does not negate willfulness.

An objectively reasonable good faith misunderstanding of the law, as I told you before, negates willfulness.

An objectively reasonable good faith misreading of the law may be based on the defendant's own legal research or an attorney's advice if such research and advice are objectively reasonable.

Good faith reliance does not require that the defendant's research come to a correct determination of the law, nor that the attorney's advice be correct if there is a bona fide dispute of law on the issue.

Advice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense.

Disagreement with the law does not constitute a good faith misunderstanding of the law because it is the duty of all persons to obey the law whether or not they agree with it.

Persistent refusal to acknowledge the law does not constitute a good faith misunderstanding of the law.

As I told you before, the government at all times bears the burden of showing willfulness.

* * * * *

APPENDIX E

Post-Verdict Notes from the Jury

Trial Transcript, pp. 1764-1765:

* * * * *

THE COURT: Now, the jury has written three documents for me which I will now read into this record.

The first note is signed by all the jurors and it says:

"Judge Plunkett:

"We are herein returning our verdict of guilty as charged on all counts.

"Some of our jurors wished to express their personal opinions. These opinions are not meant to affect in any way their verdict of guilty. These opinions are forwarded as a complaint against the narrow & hard expression under the constraints of the law.

"We would request that if possible this statement be read in court."

With that document is a document from Miss Keith that says:

"Judge Plunkett:

"I feel Mr. Cheek is a reasonable person and sincerely believes in his cause. I felt I had to write to express what I sincerely feel. I know the gentleman is guilty of a crime. However, I honestly believe he believes so deeply in his cause that he has risked everything for this cause and truly does not believe he is breaking the law."

Mr. Diener writes:

"A "Honest and Sincere in His Cause"—He is *Guilty*

"B Not "Objectively Reasonable" He Is Guilty."

Mr. Diener, I am a little unsure of what that expresses.

JUROR DIENER: What I meant there was that his cause was honest and sincere, which he's guilty since we only had this one way—you know, he's guilty, he's—his honesty and sincerity is sincere.

THE COURT: I see.

JUROR DIENER: The other part—

THE COURT: But not objectively reasonable?

JUROR DIENER: (sic) Is guilty.

THE COURT: Okay.

JUROR DIENER: I was trying to bring that out to clarify—

THE COURT: I see what you're saying. All right.

* * * * *

APPENDIX F

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 10, 1989.

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL A. KANNE, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 88-1582 vs.

JOHN L. CHEEK,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87-CR-161
Paul E. Plunkett, Judge

This matter comes before the court for its consideration upon the following documents:

1. "MOTION OF DEFENDANT TO STAY ISSUANCE OF THE MANDATE PENDING APPLICATION FOR CERTIORARI" filed herein on September 6, 1989, by counsel.

2. "GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO STAY ISSUANCE OF THE MANDATE PENDING APPLICATION FOR CERTIORARI" filed herein on September 15, 1989, by counsel.

On consideration hereof,

IT IS ORDERED that the "MOTION OF DEFENDANT TO STAY ISSUANCE OF THE MANDATE PENDING APPLICATION FOR CERTIORARI" is GRANTED and the issuance in the mandate in this appeal will be stayed pending the Supreme Court's ruling on a petition for a writ of certiorari.